



**The Comptroller General
of the United States**

Washington, D.C. 20548

Class

Decision

Matter of: HLJ Management Group, Inc.

File: B-225843.6

Date: March 24, 1989

DIGEST

1. General Accounting Office (GAO) does not review contracting officer's affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of procuring officials or that definitive responsibility criteria have not been applied. Allegation that such a determination simply was arbitrary is not sufficient to invoke GAO review.
2. Contracting officer's award of a contract following an initial determination by the Small Business Administration (SBA) regional office that the proposed awardee was a small business concern, without waiting for the result of an appeal to the SBA's Office of Hearings and Appeals, is proper since there is no requirement that the contracting officer withhold award during the appeal period.
3. The Small Business Administration has conclusive authority to decide small business size status for federal procurement purposes.

DECISION

HLJ Management Group, Inc., protests the award of a contract to Dragon Services, Inc., under request for proposals (RFP) No. DAKF40-87-R-0016, issued by the Department of the Army for full food and mess attendant services at Fort Bragg, North Carolina. HLJ principally questions the contracting officer's determination that Dragon is a responsible prospective contractor. HLJ also complains that award was made prior to final resolution of its size status appeal.

We dismiss the protest in part and deny it in part.

The RFP, a small business set-aside, was issued on November 7, 1986, and basically provided that award would be based on the best overall proposal with consideration given to stated evaluation factors.

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The Army received 12 proposals, eight of which were determined to be in the competitive range. After several rounds of discussions, and evaluation of successive best and final offers (BAFOs), the Army determined that award to Dragon was in the best interest of the government. On June 8, the contracting officer provided preaward notification of the intended award to Dragon to all offerors. On June 17, HLJ protested Dragon's small business size status to the contracting officer who referred the matter to the Small Business Administration (SBA).

On July 1, 1988, the SBA regional office denied the protest and upheld Dragon's status as a small business concern. HLJ appealed the decision to SBA's Office of Hearings and Appeals (OHA) on July 7. The contract was awarded to Dragon on December 1, prior to a decision on the appeal by OHA and after the contracting officer determined Dragon to be a responsible prospective contractor. On December 14, HLJ filed this protest.

HLJ, in its initial protest, alleged that the contracting officer made a bad faith affirmative determination of Dragon's responsibility. This allegation was primarily based on the fact that the Air Force Academy recently terminated for default a Dragon contract for custodial services. HLJ argued that Dragon should have been presumed to be nonresponsible because of its recent deficient performance unless the contracting officer expressly determined that the circumstances leading to the default were beyond the contractor's control or that the contractor had taken appropriate corrective action. HLJ also questioned Dragon's financial responsibility. In its comments on the agency report, however, HLJ specifically withdrew its allegation that the contracting officer's affirmative determination was made in bad faith. HLJ now simply alleges that the contracting officer's determination was arbitrary and capricious.

Whether Dragon is a responsible prospective contractor is a determination within the business judgment of the contracting agency. Our Office will not review protests of affirmative determinations of responsibility absent a showing of possible bad faith or fraud on the part of procuring officials or that definitive responsibility criteria set out in the solicitation may not have been met. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1988); AJK Molded Products, Inc., B-229619, Feb. 1, 1988, 88-1 CPD ¶ 96. An allegation that such a determination simply was

arbitrary, coupled with a specific withdrawal of the assertion that bad faith was involved, is not sufficient to invoke our review. Accordingly, we dismiss this protest ground.^{1/}

HLJ also argues that the contracting officer hastily and arbitrarily awarded the contract to Dragon before SBA/OHA rendered a final decision on the size appeal. HLJ contends that the Army should have delayed award because it had allegedly produced significant evidence which tended to establish that Dragon was intentionally miscertifying its size.

Under Federal Acquisition Regulation (FAR) § 19.302(h)(1) (FAC 84-12), when a size status protest has been filed, a contracting officer may not make an award until the SBA regional office has issued a determination or until 10 working days after SBA's receipt of the protest, whichever occurs first. After the 10 days have expired, the contracting officer may--but is not required to--continue to withhold award. FAR § 19.302(h)(2). Although the regulations provide for an appeal from an SBA regional office's determination by any concern that has been adversely affected, there is no requirement that the contracting officer withhold award during the appeal period. FAR § 19.302(i); H. Angelo & Co., Inc., B-218573, May 9, 1985, 85-1 CPD ¶ 519. Similarly, although to make an award before the initial 10 days expire the contracting officer must make a finding that this must be done to protect the public interest, FAR § 19.302(h)(1), there is no such requirement for justifying an award during the appeal period, JRR Construction Co., Inc., B-220592, Oct. 4, 1985, 85-2 CPD ¶ 383, and we fail to see why an award that was not made until almost 5 months after the appeal was filed should be viewed as improper solely because the appeal had not yet been decided.

HLJ further argues that the contract awarded to Dragon is void ab initio because of Dragon's intentional miscertification of itself as a small business. We find no merit to this argument. SBA is empowered to conclusively determine

^{1/} We note that the affirmative determination of Dragon's responsibility was made on the basis of a favorable preaward survey, and that the contracting officer reviewed all available information with respect to Dragon's recent substandard performance and concluded that the performance problems experienced at the Air Force Academy was an isolated case and not indicative of the contractor's overall performance record.

matters of small business size status for federal procurement purposes, and the SBA regional office found that Dragon is in fact a small business concern for this procurement. We therefore have no basis to question Dragon's certification.

Finally, HLJ, in its comments, and after the award of the contract to Dragon, alleges that Dragon falsely certified in its proposal that it did not have a contingent fee arrangement. In support of this allegation, HLJ has provided a copy of portions of an agreement between Dragon and Leonard Maley Associates, Inc., in which the latter firm agreed to provide proposal preparation and support, with payment to be made by Dragon from unspecified payments to be received by Dragon under an unidentified contract. Such postaward allegations concerning allegedly improper contingent fee arrangements are for consideration by the procuring agency in accordance with FAR § 3.409 (FAC 84-24), see Four-Phase Systems, Inc., B-189585, Apr. 19, 1978, 78-1 CPD ¶ 304, rather than our Office. Additionally, to the extent that HLJ is alleging that Dragon's conduct was criminal in nature--for example, a violation of 18 U.S.C. § 1001 (1982), which imposes criminal penalties for knowingly making false statements to the government--this matter is outside the scope of our bid protest function and should be referred to the Department of Justice. See Transcontinental Enterprises, Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel